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No. 80-2085

In the Supreme Court of the United States

OCTOBER TERM, 1980

GERIATRICS, INC., d/b/a EVENTIDE OF LAKEWOOD NURSING HOME, PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner contends that a nursing home is entitled to an evidentiary hearing prior to implementation of the Secretary's decision not to renew the home's participation as a Medicaid and Medicare provider.

1. Petitioner is the owner of a nursing home that was authorized to provide government-funded health care services to Medicare and Medicaid recipients.[1]

[1] A health care facility may participate in the Medicare program by entering into a provider agreement with the Secretary of Health and Human Services after the Secretary certifies that the facility meets the requirements for a skilled nursing facility. 42 U.S.C. (& Supp. III) 1395cc; 42 C.F.R. Part. 405, Subpart S. The standards for skilled nursing facilities under the Medicare and Medicaid pro-

The home's license, certification, and provider agreements were due to expire, by their terms, on August 31, 1979 (Pet. 7). Prior to the expiration date, the nursing home applied for renewal. A certification inspection conducted by the Colorado Department of Health in May 1979 disclosed numerous violations of Medicare/Medicaid standards; the Department furnished the home with a 37-page report detailing these violations (Pet. App. 18). During several preceding years, inspectors had uncovered similar violations by the nursing home of federal and state standards governing Medicare/Medicaid health care providers (*ibid.*). Petitioner was given an opportunity to respond in writing to the inspection report (*ibid.*). Following receipt of petitioner's response, federal and state authorities notified petitioner of their initial decision to deny petitioner's renewal applications. Petitioner then pursued an administrative appeal of the state's action and requested that its authorizations be extended pending resolution of its administrative appeal (Pet. App. 19).[2] A state hear-

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grams are set out in 42 U.S.C. (& Supp. III) 1395x(j), 1396a(a)(28); 42 C.F.R. Part 405, Subpart K. A facility is deemed to meet the requirements for the Medicaid program if the Secretary has certified it for participation in the Medicare program. 42 U.S.C. (Supp. III) 1396i(a)(1); see 42 C.F.R. 442.20(a), (b). By agreement, the State of Colorado Department of Health performs the surveys necessary to determine whether facilities in that State meet the requirements for participation in the Medicare and Medicaid programs. See 42 U.S.C. (& Supp. III) 1395aa(a), 1396a(a)(33)(B); 42 C.F.R. 405.1902(c). The Colorado Department of Health also enforces state licensure laws governing health care facilities. Colo. Rev. Stat. § 25-1-107(1)(*l*)(I) (Cum. Supp. 1980).

[2] A determination that a provider agreement will not be renewed upon its expiration is an "initial determination" (42 C.F.R. 405.1502) from which a certified facility is en-

ing officer extended the state license and Medicaid certification, but refused to renew the Medicaid provider agreement pending the final administrative determination (*ibid.*). Accordingly, on August 31, 1979, petitioner's Medicare and Medicaid provider agreements lapsed (*ibid.*).

Thereafter, on September 17, 1979, petitioner filed this action in the United States District Court for the District of Colorado, seeking to enjoin the State of Colorado and the Secretary from refusing to continue Medicaid funding prior to the holding of an evidentiary hearing on whether the home was in compliance with applicable state and federal requirements. The district court granted a preliminary injunction and ordered the agencies not to terminate funding pending the requested hearing (Pet. App. 24-41).

The court of appeals reversed, holding that there is no statutory or constitutional entitlement to a hearing prior to an initial decision not to renew a Medicaid funding agreement with a nursing home (Pet. App. 16-23).

2. The decision of the court of appeals is correct and further review is unwarranted. To begin with, petitioner had "at most a unilateral hope that new provider agreements would be executed, but such unilateral hope cannot constitute a protected 'property' interest * * *" (Pet. App. 21). Pursuant to applicable statutory and regulatory provisions, the provider agreements expired after one year and contained no renewal provisions. See 42 U.S.C. (& Supp. III) 1395cc(a)(1); 42 C.F.R. 442.15(a). As the

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titled to take an administrative appeal. 42 C.F.R. 405.1501-405.1518. If the initial nonrenewal decision is upheld on reconsideration, the facility may obtain a hearing before an administrative law judge. See 42 C.F.R. 405.1510-405.1560.

court of appeals observed (Pet. App. 21), "[t]he manifest intent of limiting the term of a provider agreement to one year is to assure that an automatic termination occurs and a new agreement may be entered into if the facility is in compliance." Before the renewal of a provider agreement, the State must assure the Secretary that the home is licensed and must certify that the facility is in compliance with federal standards (*id.* at 20-21). In these circumstances, "[t]he Home understood that a new [provider agreement] would not issue unless it could affirmatively show it was qualified" (*id.* at 21). Thus, the court below properly concluded that this case is controlled by *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Here, as in *Roth*, petitioner has not shown a "legitimate claim of entitlement" to renewal. *Id.* at 577. Accordingly, petitioner "did not have a *property* interest sufficient to require the [Secretary] to give [it] a hearing when [he] declined to renew" the provider agreement. *Id.* at 578 (emphasis in original). See, *e.g.*, *State Department of Social Services* v. *Rodvik*, 264 N.W.2d 898, 902 (S.D. 1978); *Paramount Convalescent Center, Inc.* v. *Department of Health Care Services*, 15 Cal.3d 489, 542 P.2d 1, 125 Cal. Rptr. 265 (1975), cert. denied, 425 U.S. 992 (1976); *Marshall Nursing Homes, Inc.* v. *Aggrey*, 50 Ohio App.2d 15, 361 N.E.2d 522 (1976); see also *Green* v. *Cashman*, 605 F.2d 945, 946 (6th Cir. 1979).[3]

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[3] Most of the cases cited by petitioner (Pet. 8-10) for the proposition that it has a property interest in renewal of its provider agreements are distinguishable because they concern the *termination* of an agreement during its effective period (see 42 C.F.R. 405.604(c)(2) (1979)) rather than the *failure to renew* a provider agreement. In *Rockhill Care Center, Inc.* v. *Harris*, 502 F. Supp. 1227, 1232 (W.D. Mo. 1980), the dis-

In any event, whatever the nature of petitioner's interest in renewal, that interest is adequately protected by the Secretary's present administrative review procedures, which provide for substantial opportunities to be heard prior to the Secretary's initial decision to terminate or not renew a provider agreement, and for administrative appeal and an evidentiary hearing following the Secretary's initial decision. See *Town Court Nursing Center, Inc.* v. *Beal*, 586 F.2d 266, 275-278 (3d Cir. 1978) (en banc);[4] *Case* v. *Weinberger*, 523 F.2d 602 (2d Cir. 1975). Petitioner had an opportunity to participate in those review proceedings, and to submit information and arguments in support of its contention that its contract should be renewed.

The existing procedures thus provide all the process that is constitutionally due. See *Mathews* v. *El-*

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trict court expressed "serious misgivings" about the home's assertion of a right to a pre-renewal hearing, but it granted a preliminary injunction against the Secretary because it found that the residents had no adequate alternative place to live. While we believe that *Rockhill* was wrongly decided, the district court in that case recognized the general rule that an evidentiary hearing is not required before the denial of a renewal application or before termination of a contract in accordance with its own provisions. *Id.* at 1234. This general rule applies in the instant case.

[4] Petitioner is incorrect in contending (Pet. 11-12) that there are "material distinctions" between *Town Court* and this case based on the nature of the evidence before the Secretary. In both cases the Secretary's initial decision did not turn primarily on credibility issues and the facilities had the opportunity, prior to decision, to make documentary submissions. While petitioner contends that some surveyors are not health care professionals, no such finding was made below, and, in any event, this was also the case in *Town Court*. See 586 F.2d at 271.

dridge, 424 U.S. 319 (1976). A nursing home is not the intended beneficiary of the Medicare/Medicaid programs.[5] Without government funding, it may still operate and provide care for private patients. In addition, more elaborate procedures than those presently available would be contrary to the strong public interests in insuring compliance with regulations governing adequate care for the elderly and infirm, and in the efficient allocation of limited financial and administrative resources. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 347-349; *Town Court Nursing Center, Inc.* v. *Beal*, *supra*, 586 F.2d at 278.[6]

3. Alternatively, petitioner argues (Pet. 13-14) that two federal statutes mandate a pre-renewal hearing. These arguments are insubstantial. As the legislative history makes clear, the first statute on

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[5] The district court granted petitioner's request for a preliminary injunction primarily on the basis of the "transfer trauma" that its residents might suffer as the result of changing homes (Pet. App. 29). But in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), this Court found that despite the severe physical or emotional side effects that a transfer may have on the patients, those patients do not have a property right entitling them to contest decertification of a facility. Clearly, a nursing home is in no better position to assert a property interest based on "transfer trauma" than are the patients themselves.

[6] Petitioner cites (Pet. 9) the decision in *Hathaway* v. *Mathews*, 546 F.2d 227 (7th Cir. 1976), which held that a nursing home was entitled to a hearing before revocation of its Medicaid authorization. But that decision was expressly grounded on "factors peculiar to this litigation." *Id.* at 232. In marked contrast to this case, the home in *Hathaway* had no notice or opportunity to respond prior to the termination and there appeared to be a dispute between the state and federal governments over whether violations warranting sanction had occurred.

which petitioner relies, 42 U.S.C. 1395ff(c), merely provides for a hearing before a "final" decision of the Secretary. See S. Rep. No. 404, 89th Cong., 1st Sess. 51 (1965). The issue in this case, on the other hand, is whether petitioner is entitled to a hearing before the Secretary's "initial" decision. See 42 C.F.R. 405.1502.

Petitioner's reliance on Pub. L. No. 96-499, Section 916, 94 Stat. 2623 (to be codified as 42 U.S.C. 1395cc(f)), is similarly misplaced. That statute creates a suspension sanction as an "alternative to decertification" and "in lieu of terminating the agreement or certification of the facility" (Section 916(a)(f)(1)(B)) during the term of the contract. It allows the Secretary to suspend payments to the provider (Section 916(a)(f)(1)(B)), after a hearing (Section 916(a)(f)(2)), until "the Secretary finds that the facility is in substantial compliance (or is making good faith efforts to achieve substantial compliance)" (Section 916(a)(f)(3)). The statute has no application to this case, however, because petitioner's violations and the Secretary's actions here occurred more than one year before the statute's effective date. Section 916 is also inapplicable because it creates a sanction to be imposed during the term of an agreement and does not concern a decision not to renew. Furthermore, even if a decision not to renew is viewed as a termination and decertification (contrary to 42 C.F.R. 405.604(c)(2)(1979)), in enacting Section 916 Congress expressly intended to leave decertification procedures unaffected. H.R. Conf. Rep. No. 96-1479, 96th Cong., 2d Sess. 141 (1980).[7]

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[7] Petitioner also argues (Pet. 13) that Colorado statutes regarding licensing and patient rights gave petitioner a right

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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to a pre-renewal hearing with respect to the provider agreement. Neither court below addressed this contention and it is without merit. First, petitioner's state license to operate a nursing home did not create a concomitant right to federal government funding. Moreover, the federal government's decision not to renew petitioner's government-funding contract did not limit or condition the rights conferred upon petitioner by the state operating license. Second, whatever the residents' rights may be under Colorado law, the residents have chosen not to petition this Court for review, and, pursuant to prudential standing limitations, petitioner should not be permitted to base its claim on the rights of those third parties. See *Singleton* v. *Wulff*, 428 U.S. 106, 113-116 (1976) (plurality opinion); *id.* at 123-125 (opinion of Powell, J.); *Warth* v. *Seldin*, 422 U.S. 490, 499, 509-510 (1975).

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